

**Fair Political Practices Commission**  
**MEMORANDUM**

**TO:** Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

**FROM:** C. Scott Tocher, Counsel, Legal Division  
Luisa Menchaca, General Counsel

**DATE:** September 27, 2001

**SUBJECT:** Implementation of Proposition 34; Permanent Adoption of Emergency Regulations 18539, 18539.2 and 18550 – New Online/Electronic Disclosure Reports

=====

On November 7, 2000, the voters approved Proposition 34, which significantly amended the Political Reform Act (“Act”). Among other things, Proposition 34 established three new campaign disclosure reports that must be filed online or electronically with the Secretary of State. These include two 24-hour reports for contributions and independent expenditures made during an election cycle and a 48-hour report that requires the disclosure of information relating to certain communications made within 45 days of an election.

To implement the new reporting provisions, the Commission adopted at its June meeting three emergency regulations that specify the content of the electronic reports. These emergency regulations, 18539, 18539.2 and 18550, are to expire by operation of law in October. Staff recommends the Commission adopt the proposed regulations on a permanent basis.

**I. 24-HOUR ONLINE DISCLOSURE OF CONTRIBUTIONS AND INDEPENDENT EXPENDITURES MADE DURING AN ELECTION CYCLE**

Section 85309 requires 24-hour online or electronic reporting of contributions of \$1,000 or more received during an election cycle<sup>1</sup> by candidates for elective state offices and state ballot measure committees that must file their campaign disclosure reports electronically under section 84605. The content of the report is specified in section 84203, the current statute requiring 24-hour reporting of “late contributions.” Section 85309 also requires candidates for elective state office and ballot measure committees to file electronic reports of contributions of \$5,000 or more within 10 days of receipt if outside the election cycle. *Regulation 18539 is drafted to implement section 85309.*

---

<sup>1</sup> For purposes of Section 85309, “election cycle” means the period of time commencing 90 days prior to an election and ending on the date of the election. (§ 85204.)

Section 85500 requires 24-hour online or electronic reporting of independent expenditures of \$1,000 or more made during an election cycle to support or oppose a candidate for elective state office, which are made by committees that must file their campaign disclosure reports electronically under section 84605. The content of the report is specified in section 84204, the current statute requiring reporting of “late independent expenditures.” *Regulation 18550 is drafted to implement section 85500.*

Prior to passage of Proposition 34, the Act only required 24-hour reporting of “late contributions” and “late independent expenditures.” These reports are filed during the last 16 days prior to an election to inform the public about contributions and independent expenditures of \$1,000 or more made to support or oppose a candidate or measure being voted on in the election. The Act does not require that the late reports be filed on a particular form. For the convenience of filers, however, the Commission approved use of Form 496 – Late Independent Expenditure Report, and Form 497 – Late Contribution Report. In developing the Cal-ACCESS program, the Secretary of State used these forms for electronic disclosure of late contributions and late independent expenditures.

*Regulations 18539 and 18550 state that reports filed under sections 85309 and 85500, respectively, must contain the information prescribed in FPPC Forms 496 and 497, the current late reporting forms. Subdivision (b) of each regulation also specifically states that the new reports need not be filed on paper.*

It is anticipated that the E-forms (E-496 and E-497) being prepared by the Secretary of State to accomplish the filings required above may also be used to electronically file all 24-hour reports, including the 16-day late contribution and late independent expenditure reports, which are still required under the Act. *Subdivision (c) of the regulations clarifies that the 16-day late reports must still be filed on paper, as well, pursuant to Sections 84203 and 84204.*

## **II. 48-HOUR REPORTING WHEN MAKING COMMUNICATIONS UNDER SECTION 85310**

Section 85310, subdivision (a) states:

“(a) Any person who makes a payment or a promise of payment totaling fifty thousand dollars (\$50,000) or more for a communication that clearly identifies a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election, shall file online or electronically with the Secretary of State a report disclosing the name of the person, address, occupation, and employer, and amount of the payment. The report shall be filed within 48 hours of making the payment or the promise to make the payment.”

Section 85310, titled “Issue Advocacy Disclosure,” requires online or electronic reporting by any person who makes a payment or a promise of payment totaling \$50,000 or more for communications that clearly identify a candidate for elective state office, but do not expressly advocate the candidate’s election or defeat. The report must be filed within 48 hours of making the payment or promise of payment if the communication is made within 45 days of an election. The content of the report is specified in Section 85310. ***Regulation 18539.2 is drafted to implement this section.***

At the Commission’s May meeting, the Commission interpreted section 85310 as contemplating the filing of an online or electronically filed report only, with no paper form required. This is reflected in subdivision (a) of Regulation 18539.2. The specific content of the report is set out in section 85310. In May, staff recommended that information not expressly listed in the statute be required in order to make the report more meaningful to the public and easier for the Secretary of State to process. There was no objection, and this supplementary information was incorporated into the regulation in subdivisions (a)(4)-(7) and (c)(5).

Campaign reports and statements must be verified. (§ 81004, subd. (a).) Since section 85310 requires that a *report* be filed, it too must be verified. Unlike all other campaign reports, those filed pursuant to section 85310 will be filed only online or electronically and, therefore, there will be no paper report containing the signature of the filer verifying the content of the report.

*Pursuant to the Commission’s direction in May, staff drafted Regulation 18539.2, subdivisions (b), (d) and (e) to provide a means for verification of the electronically filed report under section 85310 similar to that used by the Franchise Tax Board for E-tax returns.*

Subdivision (b) states that the Secretary of State will provide a mechanism for the filer to acknowledge the report has been properly verified pursuant to this regulation. It is contemplated that the information will be available for public viewing via the Cal-ACCESS program, along with the other required information in the report.

Subdivisions (d) and (e) set forth the requirements for proper verification, including who must file and the exact language a filer must use to verify the report. Subdivision (f) advises the filer that the electronically filed report will be considered complete and filed if all the conditions in the regulation are met.

**Related Issue Not Addressed in Regulation 18539.2:**

In addition to the reporting described above, section 85310 also requires reporting of certain individuals who make contributions for the purpose of making a communication as previously described. Specifically, subdivision (b)(1) states:

“(b)(1) Except as provided in paragraph (2), if any person has received **a payment** or a promise of a payment **from other persons**

totaling five thousand dollars (\$5,000) or more for the purpose of making a communication described in subdivision (a), the person receiving **the payments** shall disclose on the report the name, address, occupation and employer, and date and amount received **from the person.**” (Emphasis added.)

A question has arisen regarding the application of the statute when an organization receives a payment of \$5,001 from a number of smaller contributions. The question is whether the organization must disclose the information required under Section 85310, subdivision (b)(1), for *each* person who contributed a small amount toward the sum earmarked for the communication or only single payments of \$5,000 or more.

The problem is that in subdivision (b)(1) the legislature, which drafted Proposition 34, described in the first half of the sentence a payment giving rise to a reporting obligation imposed in the second half of the sentence. But the sentence as written describes “a payment from other persons,” referring to a single, joint payment, while imposing its reporting obligation on the recipient of “the payments... received from the person,” referring to multiple payments from a single person. Because of this ambiguity, Commission staff cannot determine from the language of this subdivision whether it refers to payment(s) from a single person, payment(s) from a group of persons, or to both.

Staff believes the statutory language can be read to support either of two answers. Section 85310 may be interpreted to require disclosure of information relating to contributors regardless of the size of individual contributions, so long as the “payment” toward which those persons contributed totals \$5,000 or more. On the other hand, the statute may be viewed as requiring *only* disclosure of information relating to a single person whose payment(s) total \$5,000 or more.

Staff believes that subdivision (b) is properly construed to require disclosure only of information relating to persons whose payments towards the communications at issue in subdivision (b) total \$5,000 or more, for the reasons discussed below.

If section 85310(b)(1) were construed to require disclosure of individualized contributor information, even for contributors of very small sums, this provision would be unique in the Act, which everywhere else avoids such burdens on small contributions. For example, section 84211(f) requires disclosure of the same information required by section 85310, but *only* for persons whose contributions total \$100 or more. Section 84300 prohibits cash contributions, which are difficult to trace, but this prohibition also applies *only* to contributions of \$100 or more. “Late” contributions and independent expenditures, which are subject to special reporting requirements, are expressly defined to exclude amounts less than \$1,000. (§§ 82036 and 82036.5.)

In short, the Act has consistently exhibited a policy of avoiding disclosure requirements like those of section 85310, for contributions or expenditures that fall below a particular threshold. If section 85310(b)(1) were read to require disclosure of

particularized information on contributors of less than \$100, it would depart from a policy evident throughout the remainder of the Act, and it would bring section 85310(b)(1) into open conflict with section 84211(f). As written, section 85310(b)(1) offers no basis for setting a disclosure threshold at \$100, or at any sum below \$5,000.

If section 85310(b)(1) is understood to contain a disclosure threshold at all, it would appear to be \$5,000. So interpreted, this statute would be consistent with similar provisions elsewhere in the Act, and indeed with the preceding subdivision of the same statute. Subdivision (a) of section 85310 requires disclosure relative to persons who make a payment of \$50,000 or more to fund the kind of communications regulated by that subdivision.

***Staff asks guidance from the Commission as to the correctness of staffs' conclusion in the aforementioned scenario. The Commission may determine instead that a legislative clarification is needed. In any event, staff recommends the Commission permanently adopt Regulations 18539, 18539.2 and 18550.***